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In the Supreme Court of the United States

OCTOBER TERM, 1984

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,

v.

DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO, AS HE IS NEXT FRIEND OF MICHAEL PANICO,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT ROBERT PANICO, AS NEXT FRIEND OF MICHAEL PANICO

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QUESTIONS PRESENTED

I. Does the relief provided by §1415(e)(2) of the Education for All Handicapped Children Act, 20 U.S.C §§1400 et seq., include reimbursement of tuition and related expenses incurred by parents to obtain the appropriate education for their handicapped child?

II. Where parents have rejected a proposed individualized education program, filed a timely request for administrative appeal, and then enrolled their child in a private school, does §1415(e)(3) of the Education for All Handicapped Children Act, 20 U.S.C §§1400 et seq., constitute a bar to tuition reimbursement?

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Education For All Handicapped Children: Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93d Cong. 1st Sess. (1973) 71

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Baren, M., Liebl, R., Sruth, L., Overcoming Learning Disabilities: A Team Approach (1978) 71

Smith, S.L., No Easy Answers: The Learning Disabled Child at Home and at School (1979) 72

Wagner, R. Dyslexia and Your Child: A Guide for Teachers and Parents (rev. ed. 1979) 71-72

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BRIEF FOR RESPONDENT ROBERT PANICO, AS NEXT FRIEND OF MICHAEL PANICO

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of federal law, the Education of the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773, 20 U.S.C. §§1400 et seq., as well as the relevant provisions of the law of the Commonwealth of Massachusetts, Chapter 766 of the Acts of 1972, Mass. Gen. Laws Ann. ch. 71B, §3, and certain of the implementing regulations, Mass. Admin. Code tit. 603, §28.327, 28.409 and 28.504(5), are set forth in the appendix to this brief.

INTRODUCTION

This case arises under the Education for all Handicapped Children Act, 20 U.S.C §§1400 et seq. (the "Act"). The central substantive purpose of the Act is to assure that all handicapped children be provided "a free appropriate public education which emphasizes special education . . . designed to meet their unique needs. . . " 20 U.S.C. §1400. As this Court observed in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 205 (1982), the Act's substantive goals are largely achieved through "the elaborate and highly specific procedural safeguards embodied in §1415."

On one level, this case concerns the question whether tuition reimbursement is available for a child

whose placement in a private school, although contrary to a local school's proposed educational plan, is nevertheless sustained as appropriate through the review mechanisms established under the Act. Yet, this case is about something more; the real question it poses is whether the parental right to challenge a proposed placement for a handicapped child, which this Court has recognized is central to the Act, has any practical meaning for handicapped children and their parents.

STATEMENT OF THE CASE

The long and complex administrative and judicial proceedings in this case concern Michael, the second of three children of Robert and Roseann Panico. Michael, who was born in September, 1970, lives with his family in Burlington, Massachusetts. He has

an older sister and a younger brother, both of whom attend the Burlington public schools.

The parties have always agreed that Michael is a child with above average to superior intelligence who suffers from a serious learning disability which causes him directional confusion and interferes with his reading, writing, spelling and ability to tell time. The parties have also agreed that Michael is "handicapped" within the meaning of the Act and, accordingly, is entitled to special education.[1/] The parties do not agree, however, as to two critical questions -- the nature of

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1/ The Act defines special education as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child...." 20 U.S.C. §1401(a)(16).

Michael's learning disability and the appropriate educational placement to meet his unique needs.

a. Michael's Education at the Memorial School from 1975 to 1979

Michael attended the Memorial School, the Burlington public school located near his home, from kindergarten through third grade. In first grade (1976-77), Michael had substantial difficulty learning to read. His teacher observed that Michael was having trouble paying attention to his work and was somewhat immature in comparison to his classmates. Mr. Panico repeatedly conferred with Michael's teacher, asking if any testing existed to determine if Michael had a learning problem. Mr. Panico was informed that no such testing existed.

On May 31, 1977, near the end of Michael's first grade year, the Memorial School wrote the Panicos to recommend that Michael repeat the first grade. The letter was self-styled an "educational plan", but was prepared without the consent, involvement or awareness of the Panicos.

Shortly before receiving the Memorial School's letter, Mr. Panico was informed by a teacher from a different public school system that she believed Michael had a learning disability and required a "core evaluation".[2/] In response to Mr.

2/ "Core evaluation" refers to the process used by Massachusetts law to generate an individualized education plan as required by the Federal Act. See 20 U.S.C. §§1401, 1412 and 1414 and Mass. Admin. Code tit. 603, §28.311.0 (1981).

Panico's request, the school initiated a core evaluation in June, 1977, but its result simply confirmed that the school wanted Michael to repeat first grade. In contravention of applicable regulations, the core evaluation failed either to make a determination that Michael did not have special educational needs, or to prepare an individualized education plan ("IEP"). (Appendix to Petition of the Town of Burlington for Certiorari, hereinafter "Pet." at 10a.)

During the summer of 1977, Michael was tutored in reading at the Panico's expense and made substantial progress. At the beginning of the 1977-78 school year, the Panicos accordingly requested that Michael not repeat first grade, and he was promoted to second grade. (Record

Appendix, hereinafter "R.A." IV at 326).

In second grade, Michael began to experience nightmares, migraine headaches and enormous fear of school. In late fall of 1977, Michael's pediatrician referred him to Dr. Ira Lott, a pediatric neurologist at the Massachusetts General Hospital. Dr. Lott concluded that Michael was in the superior range of intelligence, but showed clear evidence of a major learning disablity, commonly known as dyslexia. In spring 1978, Dr. Lott made his initial recommendation: a remedial program to be instituted by the Burlington school system to accompany Michael's other work at the Memorial School.

In 1978, the Memorial School prepared its first formal educational

plan for Michael covering the period from March 23, 1978 to March 23, 1979. (R.A. IV, 337-341).[3/] That plan described Michael as having the perceptual difficulties diagnosed by Dr. Lott, as well as being easily distractible. (R.A. IV, 338). The plan provided for two remedial components: first, counseling in two separate half-hour sessions each week, and second, one hour per day of individual reading instruction taught by Burlington school system reading specialist, Mrs. Kathryn Black. (Id., 340).

3/ This IEP provided for what Massachusetts characterizes under its special education regulations as a 502.2 prototype in which the student is away from the regular classroom less than 25% of the time. See Mass. Admin. Code tit. 603, §28.502.2.

Michael progressed in the spring of 1978. That summer, Mrs. Black tutored Michael on a volunteer basis so that, during the long vacation, he would not lose any of the progress he had made. At conferences held in the fall of 1978 and winter of 1979, the Panicos were assured that Michael continued to progress well.

b. The Genesis of the 1979 IEP

In April 1979, Michael began to experience a repeat of the migraine headaches, nightmares and fear of school. The Panicos consulted Mrs. Black. She told them that Michael was no longer making progress and also that, contrary to her own recommendations and without the Panicos' consent, Michael's educational program had been changed. His individual reading instruction had been reduced to one-half hour per day

(to accomodate the needs of another child). Mrs. Black suggested to the Panicos that the existing remedial program was insufficient and that Michael needed to be placed in a "total program" for the learning disabled.[4/]

During May and June, 1979, the parents had several meetings with school officials to discuss an appropriate educational plan and placement for Michael for the 1979-80 school year. At these meetings, the Panicos were told that Michael's learning problems stemmed from severe

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4/ Mrs. Black later testified at the hearing before the Massachusetts Bureau of Special Educational Appeals. She expressed the opinion that Michael's problems were not primarily emotional or behavioral and that Michael had a specific learning disability requiring a total program designed for dyslexic children like him. (R.A. III, 112, 124).

emotional or behavioral problems and that his current placement at the Memorial School was no longer proper for him. The Panicos were then told that Burlington recommended transfer of Michael to a class run by a Mr. McAleer at the Pine Glen School, a public school in Burlington several miles from the Panicos' home.

At this point, Mr. Panico requested a full core evaluation of Michael with testing by independent educational specialists. (Joint Appendix II hereinafter "J.A." at 323). Michael was again evaluated by Dr. Lott and his colleagues at the Massachusetts General Hospital. Dr. Lott informed Mr. Panico and later confirmed by letter that his test results showed that Michael's problems were not primarily emotional, that Michael was suffering from a discrete

neurological disfunction to which any "emotional" or "behavioral" problems were secondary.

On June 28, 1979, Burlington produced an IEP. The plan, which described Michael's problems as stemming from "negative attitudes and depression," proposed to transfer Michael to Mr. McAleer's class at the Pine Glen School. That class was more restrictive than his current class at Memorial and was a "substantially separate special class."[5/] The Panicos soon learned this class was generally referred to in the Burlington school system as the "primary adjustment class." (Pet. 7a). Of its six or seven students in

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5/ Designated as a 502.4 prototype under the Massachusetts regulations. See Mass. Admin. Code Ann. tit. 603 §28.502.4.

June, 1979, four or five were identified as having either behavioral or emotional problems. (Pet. 8a).

c. The Panicos Invoke the Administrative Review Mechanism and Prevail at the Hearing

The Panicos rejected the IEP on July 3, 1979, thereby invoking the administrative appeal mechanism prescribed by the Act. On July 10, 1979, Dr. Lott reiterated by letter that Michael's problems stemmed from a "severe learning disorder characterized by perceptual difficulties." He also recommended that Michael be placed in a highly specialized educational setting for children with Michael's learning disability such as the Carroll School, an approved private special education day school located in Lincoln, Massachusetts. (J.A. I, 26).

During the summer, a mediation session was held before the Bureau of Special Education Appeals ("BSEA"). However, when mediation proved unsuccessful, a hearing was scheduled before the BSEA. (J.A. I, 27, 34).[6/]

In early August, Mr. Panico also made contingency plans to enroll Michael in the Carroll School. On August 10, 1979, he made a deposit of $200 to secure a place for Michael (R.A. IV, 434). Only when it became clear in late August that mediation had failed and that the administrative hearing would not begin until late September did the Panicos actually enroll Michael at the Carroll School.

6/ A more detailed chronology of the events of July and August, 1979 is set forth at pp. 59-64, infra.

The administrative hearing before the BSEA took place over four days: September 26, October 30, 31 and November 1, 1979. Extensive testimony and more than 125 exhibits were introduced.

The hearing officer issued her decision on January 31, 1980. (Pet. 1a-27a). She found that Mr. McAleer's classroom at the Pine Glen School was not an appropriate placement for Michael; she also found that the Carroll School was the least restrictive appropriate placement for Michael. (Pet. 14a-15a). In particular, the hearing officer found that Mr. McAleer had limited experience teaching children with Michael's learning disabilities and that Michael needed a peer group "with similar need for a focus on reading objectives and with whom similar

teaching methods would be employed." (Pet. 14a). The reading skills of the students in Mr. McAleer's class were widely disparate:

> Just two children have learning disabilities.... Even if a group structure were possible, the skill variance among students might have the effect of increasing Michael's frustration.

(Pet. 15a). Further, Mr. McAleer's class would involve a day shortened by transportation schedules, rather than on account of Michael's needs. (Pet. 16a-17a).

The hearing officer also found "substantive and continuing procedural irregularity by Burlington." (Pet. 13a). Some of these findings pertained to prior years: for example, Burlington had failed to develop an educational plan within the meaning of state law when it proposed that Michael repeat first grade.

(Pet. 18a). Most significantly, by reducing the amount of time Michael spent with Mrs. Black during the 1978-79 school year, Burlington violated both Federal law and the Massachusetts regulation, §337.2, which requires parental consent before an IEP may be modified. Mass. Admin. Code Ann. tit. 603 §28.337.2. (Pet. 20a).

Many of the violations pertained to the manner in which the IEP in question was prepared, as well as aspects of the proposed placement in Mr. McAleer's class. For example, Burlington had exceeded the maximum age limit span in Mr. McAleer's classroom in violation of Massachusetts regulations. Mass. Admin. Code Ann. tit. 603 §28.502.4(c). (Pet. 17a). Burlington had also failed to give the Panicos

notice or to seek their consent in the spring of 1979 for evaluations used to "determine classroom placement and program" of Michael in violation of Massachusetts law, Mass. Gen. Laws Ann. ch. 71B, Mass. Admin. Code tit. 603, §§28.317.0-317.5, 28.505.5, and federal regulations, 34 C.F.R. §300.504. (Pet. 18a). The core evaluation meeting failed to include all persons responsible for assessments of Michael, in violation of Massachusetts regulations that seek to insure that "educational decisions are based on a view of a whole child." Mass. Admin. Code tit. 603, §§28.311.0, 312.0 (Pet. 18a-19a).[7/]

7/ Throughout the judicial proceedings, Burlington has persisted in demeaning the significance of the hearing officer's findings of "substantive

(Footnote continued on next page)

After concluding that Burlington's proposed IEP was not appropriate and that the Carroll School was the least restrictive appropriate placement, the hearing officer ordered Burlington to pay Michael's tuition for the 1979-1980 year, as well as the costs of transportation to the Carroll School. The hearing officer also ordered Burlington to reimburse the Panicos for costs they had incurred to

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(Footnote continued from previous page)

and continuing procedural irregularity by Burlington" -- most recently by referring to them as "facially trivial" in its brief to this Court (see, e.g., Brief for Petitioners, at 29). The Court of Appeals had a different view of Burlington's oft-repeated attitude towards these violations of Michael's procedural rights: "This court declines to rescue the plaintiff from its stance of stubborn indifference to and deprecation of its violations of [Michael's] procedural rights." (See Order of Court on Burlington's Motion for Rehearing and Rehearing en banc, Pet. 147a).

date for Michael's placement at the Carroll School.

d. The Litigation: February, 1980 to June, 1981

On February 26, 1980, Burlington filed a two count complaint in federal court against Mr. Panico and the Massachusetts Department of Education (the "State") to challenge the BSEA decision. The first count sought review under 20 U.S.C. §1415 (e)(2); the second asserted a state claim under the Massachusetts Administrative Procedure Act, Mass. Gen. Laws Ann. ch. 30A, §14.

On November 19, 1980, the court granted summary judgment in favor of the Panicos and the State upholding the BSEA decision (Pet. 28a-34a). This decision was rendered in accordance with the "substantial evidence" standard of the judicial review provisions of the Massachusetts

APA. On December 11, 1980, Burlington filed a notice of appeal from this ruling to the Court of Appeals for the First Circuit.

Despite the BSEA decision, Burlington failed to pay tuition or related expenses for 1979-1980, or for 1980-1981.[8/] Mr. Panico had borrowed to pay the Carroll School for 1979-1980. As of December 1980, no one had paid tuition for the 1980-1981 year. Accordingly, the State and the Panicos filed motions for preliminary relief, asking the court to order Burlington to reimburse the parents for the 1979-1980 tuition and to pay

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8/ Under state law, a complaint for judicial review does not operate as a stay of the BSEA decision which is to be implemented forthwith. See Mass. Admin. Code tit. 603, §28.410.0. On May 8, 1980, Burlington moved for a stay of the BSEA decision. This motion was denied by the district court on July 24, 1980. (J.A. I, 1).

the current year's tuition. At a hearing on February 9, 1981, Burlington finally agreed to pay Michael's tuition and related costs for the 1980-1981 school year. However, Burlington refused to reimburse the parents for the 1979-1980 year. On February 12, 1981, the court ordered Burlington to comply with the order of the BSEA and to reimburse the Panicos for tuition they had paid during the 1979-80 school year. (J.A. I, 187-88). Burlington appealed from this order as well as from the previous denial of its motion for a stay.

On June 18, 1981, the Court of Appeals issued its first opinion in this case. (Pet. 36a-47a). The court affirmed the denial of Burlington's motion for a stay of the BSEA order. However, the court vacated the

district court's order granting summary judgment on the ground that the Act, §1415(e)(2), provided a preemptive standard of review.[9/] It then remanded the case to the district court for a trial under the federal standard. The court also vacated the district court order that Burlington reimburse the Panicos for 1979-1980 tuition.

e. The Case on Remand - June, 1981 to May, 1983

In the fall of 1981, Burlington moved for summary judgment on several grounds: 1) that 20 U.S.C. §1415(e)(3) barred the parents from receiving any tuition reimbursement

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9/ The federal provision directs that the reviewing court "'shall hear additional evidence at the request of a party', while the state provision normally confines its review to the record developed by the agency." (Pet. 42a-43a).

because they had changed their minor child's placement prior to the resolution of review proceedings; 2) that the court's jurisdiction was limited to the 1979-1980 year; and 3) that Burlington was also not liable for years after 1979-1980 because the Panicos had allegedly failed to make Michael available for an evaluation after that time. (J.A. I, 189).

On March 18, 1982, the district court entered a detailed pre-trial order governing the issues raised by Burlington's motion for summary judgment as well as several other questions pertaining to the conduct of the trial which had been raised by the parties in pre-trial memoranda. (Pet. 48a-56a). In its order, the district court ruled that it had jurisdiction over 1979-1980 and subsequent years, that the court would accept

"additional relevant evidence" to the BSEA finding to determine the appropriate placement, and that the burden of proof would be on Burlington with respect to 1979-1980 and on the Panicos with respect to subsequent years. (Pet. 49a-50a). Further, the district court denied Burlington's summary judgment motion, finding that §1415(e)(3) was not intended to bar the parents' right to obtain review of a child's placement, but rather meant that a parent who moved a child into a private school would be at risk for tuition paid during the pendency of the proceedings should the parent ultimately lose on the issue of the appropriate placement. Finally, the court declined to receive evidence regarding the allocation of fault between the parties for the failure to

prepare IEPs for the 1980-81 and 1981-82 school years.[10/]

The trial was held on four days in May 1982. Burlington introduced testimony from the same six witnesses who had testified at the administrative hearing, in addition to testimony from Michael's first grade teacher and an

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10/ Burlington's Brief at 36 again tries to resurrect the notion that the Panicos prevented Burlington from preparing an IEP for Michael in these years. However, the correspondence between the Panicos' then counsel and Burlington regarding evaluations for 1980-1981 and 1981-1982 makes clear that the Panicos' had sought an IEP and were, in fact, willing to make Michael available for later years, if certain guidelines were observed. (J.A. I, 181-85). Because of the district court's pre-trial ruling, no evidence was introduced and no factual finding made as to conduct regarding the preparation of IEPs for later years. (see also the Court of Appeals discussion of why Burlington's constant assertions on this point are without merit. Pet. 123a).

additional expert. Mr. Panico and the State relied largely on the BSEA decision but introduced testimony from Mr. Panico, from three teachers and an administrator at the Carroll School and from a doctor who had treated Michael since 1981. In an August 1982 decision, the district court found Burlington had shown, "by a preponderance of the evidence," that its proposed placement in Mr. McAleer's class was appropriate for the year 1979-1980 and that the parents had failed to meet their burden to show "that for subsequent years such placement would have been inappropriate." (Pet. 66a).

Burlington then submitted a proposed form of judgment and bill of costs seeking an order requiring Mr. Panico to repay the tuition and transportation costs it had paid for

1980-81 and part of 1981-82 (in the amount of $12,844.66) and costs, including its expert witness fee (in the amount of $8,631.90). (R.A. I at 93-94). On September 30, 1982, the district court entered an order approving certain items in the bill of costs, but disallowing others, including the expert witness fee.

On March 7, 1983, the court ruled that Mr. Panico was obliged to repay Burlington any sums it had advanced for Michael's tuition and related transportation, less any marginal costs Burlington would normally have incurred to educate Michael and less any funds received from the State for Michael's education. On May 9, 1983, the district court entered judgment ordering the Panicos to repay Burlington $8,449.00 and ruling that Burlington was not responsible for

the expenses that the Panicos had incurred for the 1979-80 school year. (J.A. II, 407).

f. The Court of Appeals' Reversal

The Panicos and the State appealed from the district court's decision setting aside the BSEA's ruling on the appropriate placement; they also sought reversal of the retroactive reimbursement awarded to Burlington. The Court of Appeals issued its second opinion on May 29, 1984. (Pet. 87a-143a). The Court vacated the district court's finding as to the appropriate placement for Michael as inconsistent with the deference due the findings of the BSEA hearing officer under this Court's opinion in Rowley, supra, and remanded for a new trial. The Court of Appeals ruled, inter alia, that the district court had incorrectly applied the "additional evidence" standard of

§1415(e)(2), had misallocated the burden of proof, had failed to consider the significance of Burlington's procedural violations, and had failed to make appropriate findings with respect to the nature of Michael's learning disabilities. The court also issued guidelines to the district court on the issue of reimbursement.

The court concluded that reimbursement of tuition was available as a form of relief under §1415(e)(2) of the Act and that the "then current placement language" of §1415(e)(3) did not present a bar to the parents' right to obtain reimbursement. (Pet. 127a-28a). It further ruled that the award of tuition was not automatic but was "to be a matter of equitable relief, committed to the sound

discretion of the district court." (Pet. 137a).

On September 18, 1984, Burlington filed a petition for writ of certiorari seeking review of all aspects of the Court of Appeal's decision. This Court granted certiorari limited to questions I and V, which address the power of the district court to grant tuition reimbursement.

SUMMARY OF ARGUMENT

The decision of the First Circuit Court of Appeals should be affirmed in all respects. The "appropriate relief" provided by §1415(e)(2) encompasses tuition reimbursement. This is the only reading that is consistent with the language of the section and with the Act's legislative history and goals. It is also the only reading that can give practical

meaning to the extensive procedural protections afforded to parents and children under the Act.

Section 1415(e)(3), which safeguards continuity in the child's educational placements, does not address the allocation of financial responsibility and does not constitute a bar to a parent's obtaining tuition reimbursement under the Act. It was intended to protect the rights of handicapped children and their parents during placement disputes and to prevent a local educational agency from unilaterally altering a handicapped child's educational program.

ARGUMENT

I. UNDER THE ACT, A DISTRICT COURT HAS THE DISCRETION TO AWARD TUITION REIMBURSEMENT.

Section 1415(e)(2) provides that a court reviewing a state administrative

decision has the power under the Act to "grant such relief as the court determines is appropriate." §1415(e)(2). Under this broad grant of authority, the district court has the discretion to award the Panicos the tuition and related costs of placing Michael in the Carroll School. While Burlington would impose substantial limitations on the court's power to award relief, this view is without support in the language of §1415(e)(2) and is contrary to the overall purposes of the Act, its legislative history, and prevailing case law.

A. The Act's Procedural Mechanisms Are Instrumental To The Accomplishment Of The Act's Substantive Goals.

From the vantage point of handicapped children and their parents, the Act's central purpose is

"to assure that all handicapped children" be provided "a free appropriate public education which emphasizes special education . . . designed to meet their unique needs" and "to assure that the rights of handicapped children and their parents are protected." 20 U.S.C. §1400.

Instrumental to the provision of the "free appropriate public education" contemplated by the Act is the development of an "individualized education program" ("IEP"). The Act requires the local educational agency to provide assurances that it will annually "establish, or revise . . . an individualized education program for each handicapped child." 20 U.S.C. §1414(a)(5). As this Court has noted, the IEP is the "means" by which the "'free appropriate public education' required by the Act is

tailored to the unique needs of the handicapped child." Rowley, supra, 458 U.S. at 182.

The Act also requires each participating state and local education agency to establish elaborate review procedures "to assure that handicapped children and their parents . . . are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C §1415(a). Central among these safeguards is the "impartial due process hearing" to challenge what they view as an erroneous decision by the school authorities regarding the evaluation or placement of their child. 20 U.S.C. §1415(b)(2).

This Court has repeatedly stressed the central role of the Act's review

procedures. As this Court observed in Rowley,

> Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.

Id. at 205-206.

Again, in Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 3457, 3469 (1984), this Court reemphasized the connection between the procedural and substantive goals of the Act:

> The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards and a right to judicial review.

B. Tuition Reimbursement Is The Only Relief Which Would Make The Review Afforded By The Act Meaningful.

The language of §1415(e)(2) is a broad grant of authority which imposes no express limitation on the power of the reviewing court to award relief: "the court shall grant such relief as the court determines is appropriate." Further, the Senate Conference Report supports a broad construction; it describes the power of the district court to award "all appropriate relief." Sen. Conf. Rep. No. 45, 94th Cong., 1st Sess. 50, reprinted in 1975 U.S. Code Cong. & Ad. News 1503 (1975)(emphasis added). Any limitation on the power to grant appropriate relief "should not be lightly inferred." Matthews v. Ambach, 552 F. Supp. 1273, 1279 (W.D.N.Y. 1982)(declining to grant

summary judgment on the ground no tuition reimbursement is available under the Act).

The legislative history of the Act shows that Congress believed the Act gives the hearing officer and reviewing court the power to order tuition reimbursement. Discussing the forerunner of §1415, the Senate Committee report states:

> If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under section 614 (5) applies.

Senate Report No. 168, 94th Cong. 1st Sess. 32, reprinted in 1975 U.S. Code Cong. & Ad. News 1456 (emphasis added).[11/]

Further, unless relief provided under §1415(e)(2) includes the power to order tuition reimbursement, the important parental right to reject and seek review of an IEP will be meaningless. A hollow declaration, six years after the parents reject an IEP, cannot be the only relief that Congress intended. Similarly, limiting the court to a prospective determination makes little sense; the child's needs may change in future years, leaving the challenged IEP without meaning. Why create the

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11/ Section 614 (5) created procedural safeguards which were nearly identical to the §1415 due process procedures ultimately enacted.

elaborate procedural safeguards and mechanisms to ensure parental participation, if the reviewing court ultimately does not have the authority to award the only relief which can make review meaningful?

C. Tuition Reimbursement Serves The Statutory Goal Of Providing A Free Appropriate Public Education.

Tuition reimbursement for an appropriate placement places the burden of providing the "free appropriate public education" where it belongs under the Act -- on the school district.

> It is difficult to imagine a better "fit" between such a statutory purpose and an award of damages limited to the amount of expenses incurred in providing an appropriate education for a handicapped student in the event that a school district has failed to satisfy its obligations to provide such an education.

Matthews v. Ambach, supra, at 1279. In Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983), the court noted that if a parent pays a private school later found to be the appropriate placement,

> the school system has effectively transferred part of its contractual public obligation to a private party, in contravention of the statute's express primary directive . . . [to provide a] free appropriate public education.

Id. at 916.

Reimbursement provides the proper incentive for the parent to seek an appropriate placement. A court's power to order reimbursement as appropriate relief properly allocates the financial risk by "requir[ing] each party to bear the cost of its own errors of judgment in determining what a 'free appropriate education' for a child requires in the pertinent

circumstances." Doe v. Brookline, supra, at 920. The potential for reimbursement for a placement later found to be justified would encourage parents, when "convinced that their child is not receiving an appropriate education," to be "assiduous in protecting their child's rights," while the "potential of having to repay the school system for a change to a private school would militate against impulsive or unfounded actions; a balance is struck." Id. at 920-21.

D. The Prevailing View Is That Reimbursement Falls Under The Relief Provided By §1415(e)(2).

The prevailing view among the federal courts is that the relief provided in §1415(e)(2) does encompass reimbursement to parents for

tuition in at least some

circumstances.[12/]

12/ See Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1983); Doe v. Brookline, supra (1st Cir. 1983); Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Gary A. v. New Trier High School District No. 203, 1983-84 EHLR (BNA) 555:376 (N.D. Ill. 1984); Hall v. Vance 1983-84 EHLR (BNA) 555:437 (E.D.N.C. 1983); Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983); Matthews v. Ambach, 552 F. Supp. 1273 (W.D.N.Y. 1982); William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982); Gregg B. v. Board of Education of the Lawrence School District, 535 F. Supp. 1333 (E.D.N.Y. 1982); Carter v. Independent School District No. 6 of Sequoyah County, 550 F. Supp. 172 (W.D. Okla. 1981); Tatro v. Irving Independent School District, 516 F. Supp. 968 (N.D. Tex. 1981), aff'd 703 F.2d 823 (5th Cir. 1983); ___ U.S. ___, 104 S. Ct. 3371 (1984); Miener v. State of Missouri, 498 F. Supp. 949 (E.D. Mo. 1980), modified, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909, (1982); North v. District of Columbia Bd of Ed., 471 F. Supp. 136 (D.D.C. 1979).

In the few reported cases where a school district failed to provide an appropriate education for the child, courts have uniformly awarded tuition reimbursement. See Tatro v. Irving Independent School District, 516 F. Supp. 968 (N.D. Tex. 1981), aff'd, 703 F.2d 823 (1983) and ___ U.S. ___, 104 S. Ct. 3371 (1984); Katherine D., supra; and Hall v. Vance, supra.

In Tatro, this Court affirmed an award of reimbursement for the cost of obtaining medical services which the Court found to be that portion of the "free appropriate public education" referred to as "related services" under 20 U.S.C. §1401(a)(17).[13/] The district court found the school

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13/ "Free appropriate public education" is defined as "special education and related services." 20 U.S.C. §1401(a)(18).

district's IEP inappropriate because it failed to provide plaintiff with the "free, appropriate public education required by the Act." The court ordered the school district to prepare an IEP for the current year which would provide the necessary services, and to reimburse the Tatros for the expenses of obtaining elsewhere the education and services required by the Act for prior years.

> The school district, by reimbursing the parents, indirectly bears the cost it would have borne directly had it furnished the services it was obligated to provide. That is, the money "damages" reflect no more than a judicially compelled provision of the statutorily ordered free appropriate education. This relief seems to fall within the congressionally mandated duty to "grant such relief as the court determines is appropriate."

Id. at 978.

The Court of Appeals for the Fifth Circuit and this Court each affirmed the district court's decision, including its award of reimbursement to the parents for the money they had previously been obligated to spend to secure the required "related services". If the district court has the authority to award reimbursement for related services, then it must also have authority to award reimbursement for the special educational program to which those services "relate". While this Court's decision in Tatro may not have expressly decided that the district court has the discretion to award a parent tuition reimbursement under the

Act, the holding is implicit in the Court's reasoning.[14/]

Those courts which have interpreted §1415(e)(2) to limit tuition reimbursement to narrow circumstances have not been presented with facts akin to those now before the Court. A close reading of those cases demonstrates that their narrow construction of §1415(e)(2) arises in a context where the school district has offered an appropriate placement.

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), is the most prominent example. In Anderson, both the hearing officer and the district court found that while the Wisconsin

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14/ See also Hall v. Vance County Board of Education, 1983-84 EHLR (BNA) 555:437 (D.N.C. 1983)(tuition reimbursement awarded on facts strikingly similar to those before this Court).

school system may have incorrectly diagnosed the plaintiff, the parents had failed to show that the appropriate diagnosis "mandated any differences in programming." Id. at 1208.

The Court of Appeals for the Seventh Circuit affirmed the district court's refusal to order tuition reimbursement. Thus, the issue of reimbursement was presented to the court in a setting where the school district had, in fact, provided what the hearing officer and the reviewing courts had concluded was an appropriate placement.

In affirming the denial of reimbursement on the facts before it, Anderson reasoned that tuition reimbursement would, nevertheless, still be available in certain narrow circumstances, such as where the

procedural irregularities of the school district suggest bad faith, or where exigencies of the child's health require immediate withdrawal. Neither of those circumstances were, however, then before the court.[15/]

It is one thing to say that tuition reimbursement may be denied where a school district has provided an adequate program. See, e.g., Marvin H. v. Independent School District, 714 F.2d 1348 (5th Cir. 1983); Scokin v. State of Texas, 723 F.2d 432 (5th Cir. 1984). It is quite

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15/ Significantly, Judge Swygert, the author of Anderson, sat by designation on the First Circuit Court of Appeals panel which decided the instant case. Doubtless if Judge Swygert felt that the overall analysis of the Court of Appeals in this case conflicted with his opinion in Anderson, he would not have joined in the court's decision.

another to say that tuition reimbursement cannot be an appropriate form of relief under the Act.

It is the latter, seemingly self-evident proposition that Burlington urges this Court to reject. Yet, the language of §1415(e)(2) as well as the overall framework, purpose, and legislative history of the Act, make it clear that Congress intended a district court to have the discretion, in appropriate circumstances, to award tuition reimbursement.

E. The Court Of Appeals' Guidelines For Determining Whether Tuition Reimbursement Should Be Awarded In Particular Cases Are Fully Consistent With The Act.

In a complex factual and procedural setting, the Court of Appeals made it clear that, while tuition reimbursement was available to the prevailing party under

§1415(e)(2), such reimbursement was not automatic. Rather, the district court is to consider the ramifications of a series of equitable factors before it decides upon the "appropriate relief" in a particular case.

Despite Burlington's repeated assertions to the contrary, the considerations discussed by the Court of Appeals do not pertain to an award of "damages" in any normal sense of that word. For example, the parents do not seek, nor has the Court of Appeals ever authorized, compensatory damages under the type of "educational malpractice" theory raised and rejected in Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979).

Similarly, there are no claims here for "punitive" damages, and the Court of Appeals specifically rejected

the parents' arguments that they should automatically receive tuition through final judgment in reliance on the BSEA decision, reasoning that such relief "smacks more of a penalty." (Pet. 136a). Rather, the guidelines govern restitution for tuition payments and related costs for a handicapped child who is admittedly entitled to services under the Act.

On remand, the district court may affirm the BSEA decision in all respects and find Burlington's proposed IEP was inappropriate and that the Carroll School was the appropriate placement for Michael. The court may then award tuition reimbursement to the parents "unless the court finds that other factual circumstances not now apparent warrant a different result." (Pet. 124a). Thus, if Burlington proves to the

district court that the parents failed to cooperate in the preparation of the IEP, or to attend mediation sessions, or engaged in other conduct unreasonable in the circumstances, then the district court could deny tuition reimbursement even if the parents prevail on the appropriate placement issues.

Similarly, if the district court reverses the BSEA decision and upholds Burlington's 1979-80 IEP, then factors such as those described by the Court of Appeals should determine whether an award of reimbursement to Burlington is "appropriate relief". These factors will include: 1) the parents' reasonable reliance on the BSEA decision and subsequent court decisions and 2) the "substantive and continuing procedural" violations which the hearing officer found

Burlington had committed regarding Michael.

The Court of Appeals has made the award of tuition reimbursement depend not merely on the outcome of the district court's ultimate decision on the appropriate placement, but also on an even-handed application of a set of equitable principles to the parties' conduct during this six-year saga. Such an approach is sensible, fair and would appear to be precisely what Congress intended when it provided the district court with the flexible authority of §1415(e)(2) to "grant such relief as the court determines is appropriate."[16/]

16/ A statutory remedy need not entitle prevailing parties to the same relief where the statute's purposes would not be served

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II. THE PANICOS' ENROLLMENT OF MICHAEL IN THE CARROLL SCHOOL, PENDING ADMINISTRATIVE AND JUDICIAL REVIEW, DOES NOT BAR THEM FROM SEEKING REIMBURSEMENT UNDER §1415(e)(3)

As set forth above, §1415 of the Act provides certain "procedural safeguards". Included among these safeguards is §1415(e)(3), which provides:

> During the pendency of any [judicial or administrative review] proceedings . . . unless the State or local educational agency and the parents . . . otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public

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thereby. See Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421 (1978)(attorney's fees routinely awarded to "prevailing party" in civil rights action; but, award to successful defendant permitted only where action brought found to be unreasonable, vexatious, frivolous or meritless).

> school, shall with the consent of the parents ... be placed in the public school program until all such proceedings have been completed.

Burlington argues that where parents "unilaterally" change the placement of a child from a public to a private school they are in violation of §1415(e)(3). Burlington further argues that if parents unilaterally change the placement of their child during the pendency of review, then parents are barred from tuition reimbursement under §1415(e)(2) regardless of whether their placement is ultimately upheld. The Court of Appeals was correct in concluding that neither of these logical leaps is justified either by the language or derivation of §1415(e)(3) specifically, or by the overall purposes of the Act.

The factual context in which Burlington invokes §1415(e)(3) as a bar to reimbursement makes clear the dilemma parents like the Panicos face when they exercise one of the key procedural rights Congress gave them under the Act -- i.e., the right to reject an IEP and seek review of the appropriateness of the rejected IEP.

On July 3, 1979, Mr. Panico rejected the IEP. (R.A., IV, 519). The rejected IEP was forwarded by Burlington to the BSEA on July 6, 1979. (R.A. IV, 510). Having received no word from the BSEA as to what would happen next, he telephoned a Ms. Betsy Burch of BSEA on July 17, 1979 for instructions as to how he should proceed. He followed this up with a letter to the BSEA on July 17th (J.A. I, 28), again requesting a hearing and confirming his

understanding that the hearing would be held within 20 days.[17/]

On July 30, the BSEA notified the Panicos that their appeal would be scheduled for August 8th (J.A. I, 30); Mr. Panico then retained counsel, the hearing was postponed, and a mediation session was, in fact, scheduled for August 17th. In the hopeful and cooperative spirit with which the Panicos approached the mediation,

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17/ Mr. Panico has testified in several places in the administrative record (e.g., R.A. IV, 475; R.A. III, 250-251) that he was informed by Ms. Burch that Burlington initially had refused to participate in mediation. (See also Testimony of Mr. Michael of Burlington, R.A. III, 528-32). As explained supra, at 27, the district court, in its pre-trial order, had ruled that §1415(e)(3) was not a bar to the parents' claim for tuition reimbursement. Consequently, no findings were made by the district court regarding this point or other conduct of the parties during this period.

their then counsel forwarded to the Superintendent of the Burlington schools medical reports from Massachusetts General Hospital and advised that Michael's remedial reading teacher, Mrs. Black, was also willing to attend the mediation session. (J.A. I, 32-33). However, the session proved fruitless, and the Panicos again requested a hearing which was scheduled by the BSEA for September 26, 1979. (J.A. I, 35).

In rejecting the proposed IEP, the Panicos scrupulously followed the procedures for review provided by state and federal law and took every step they could to expedite the proceedings. However, due to circumstances beyond the Panicos' control, the hearing was postponed until after the commencement of the next school year. Thus, the parents

were faced with a difficult choice during the pendency of the proceedings they had invoked: either place their child in the IEP which they had rejected on the advice of Dr. Lott and Mrs. Black, or place Michael in the school recommended by these specialists, i.e., the Carroll School. The Panicos did what all rational parents would do in this setting: they made contingency plans to enroll Michael in the Carroll School.[18/] That is, on August 10th,

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18/ In the summer of 1979, no one familar with the Massachusetts' special education laws and regulations would have dreamed that, by placing a child in private school after rejecting an IEP and requesting an administrative hearing, the parents would be forever barred from obtaining tuition reimbursement if the school's educational plan was eventually held not to be appropriate.

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they made a deposit of $200 to secure a place for Michael in case mediation failed. (R.A. IV, 434). Then, on August 22nd, when mediation had proved unsuccessful, the Carroll School prepared an educational plan for Michael which was intended to be used both for Michael's education and to be submitted to the hearing officer. (R.A. IV, 436-44). Finally, when it became clear that the hearing would

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Rather, the Supreme Judicial Court in Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480 (1978), had unambiguously concluded the opposite. See infra at 86-89. That everyone understood this principle in the summer of 1979 is evidenced by Burlington's failure to say anything to the contrary during the administrative hearing or, in fact, until well into the judicial proceedings. See, e.g., Burlington's brief submitted to the hearing officer, R.A. IV, 286-295.

not begin until late September, Mr. Panico paid the first semester's tuition to Carroll. His payment was made on September 5th, and Michael began school two days later. (R.A. IV, 434).

A. Section 1415(e)(3) Does Not Relate To Funding.

As the Court of Appeals has made clear, the "then current placement" language of §1415(e)(3) does not relate to the question of ultimate financial responsibility for the payment of special educational services. Instead, this section was intended merely to insure that, during placement disputes, a local educational agency could not unilaterally change a child's

educational placement.[19] See Doe v. Brookline, supra, 722 F.2d at 918 (§1415(e)(3) establishes a "strong preference, but not a statutory duty, for maintenance of the status quo"). Accord, Anderson v. Thompson, supra.

Burlington's construction of §1415(e)(3) was specifically rejected in the case of Frankel v. Commissioner of Education, 480 F. Supp. 1156 (S.D.N.Y. 1979) as clearly inconsistent with the procedural safeguards provided by the Act. In

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19/ That §1415(e)(3) was intended for the protection of handicapped children and their parents and not towns may be inferred from the section's last clause which deals with a situation where a parent is applying for the child's initial admission to school. This clause makes it clear that the town cannot exclude the child from the public school (without parental consent) until any administrative hearing or judicial review is complete.

rejecting the defendants' motion to dismiss, the Court reasoned as follows:

> Defendants appear to be claiming that, during the pendency of the appeal, plaintiffs had no choice other than to accept the decision of the Commission or provide a suitable educational alternative at their own expense. In effect, this interpretation renders the Commissioner's decision final and unreviewable for the 1976-77 school year and deprives the defendants of the rights protected by the Education for All Handicapped Children Act and New York Education Law. . . .

Id. at 1160 (emphasis added).

Stemple v. Board of Education of Prince George County, 623 F.2d 893 (4th Cir. 1980), on which Burlington relies, arises in a fact situation which properly should be distinguished from the facts before this Court. First, in Stemple, the district court had dismissed the suit on the ground that the plaintiff could not obtain

judicial relief under the Act because the challenged administrative proceedings concerned reimbursement for a period prior to the effective date of the Act. Second, state agency review had found that the school district was capable of providing an appropriate education for plaintiff in the public schools. Finally, the parents had withdrawn their child from the public school in Stemple without invoking any of the procedural protections of the Act. It was only after withdrawal that they requested the school district to fund the private school.

On appeal, the Fourth Circuit determined that it need not consider whether the Act should apply to reimbursement for tuition paid before the Act became effective, since the language of §1415(e)(3), it reasoned,

precluded reimbursement. Id. at 896. Thus, the issue of whether, once parents had properly invoked the review procedures, they are bound by a status quo provision was not considered by the Fourth Circuit.

Other cases to apply the Stemple rule have similarly involved facts which suggest that parents placed their child in a private school notwithstanding the fact that the public school ultimately is held to have offered an appropriate placement. See, e.g., Flavin v. Connecticut State Board of Education, 553 F. Supp. 827 (D. Conn. 1982)(state hearing officer affirmed the IEP as did Board of Education); Scokin v. State of Texas, 723 F.2d 432 (5th Cir.

1984)(child found to benefit from state placement).[20]

B. The Legislative History Of 1415(e)(3) Makes It Clear That Congress Did Not Intend This Section To Operate As A Bar To A Parent Seeking Reimbursement.

Section 1415(e)(3) was added at the conference stage. The Senate floor debates make clear Congressional concern that extended due process procedures would cause a detrimental delay in the child's change of placement. Senator Stafford, a member

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20/ Mountain View-Los Altos Union High School District, 709 F.2d 28 (9th Cir. 1983), cited frequently by petitioner, must also be understood in context. Contrary to petitioner's representations that the case confirms an alleged bar to reimbursement on account of the "stay-put" provision of §1415(e)(3)(Petitioner's Brief at 42), the Ninth Circuit simply refused to award what it characterized as damages, relying on the reasoning articulated in Anderson v. Thompson, supra. Id. at 30.

of the Committee on Labor and Public Welfare, the sponsor of the Act, noted "the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus, the conference adopted a flexible approach to try to meet the needs of both the child and the State." S.20429. Thus, Congress was concerned, in passing the Act, that a child's individualized educational program not be delayed by the due process review afforded by the Act.[21/]

21/ Petitioner has correctly pointed out that learning disabilities are difficult to remedy. (Brief at 39). Petitioner's argument that it makes no difference what educational placement is offered a child with learning difficulties, or when such a placement is offered, is contrary to the basic

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The evolution of the Act also suggests the genesis of §1415(e)(3). As this court observed in Rowley, two lawsuits, Mills v. Board of Education

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> propositions on which the Act was founded. The legislative history shows Congress was aware of the need for early intervention for the learning disabled. See, e.g., Testimony of New Jersey Inter-Agency Committee for the Handicapped, Education For All Handicapped Children: Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. 263 (1973)("widely accepted that the earlier we identify handicaps and intervene with appropriate educational therapy, the greater the chances are for rehabilitation"); Statement of Dr. Charles Barnett, Commissioner, South Carolina Department of Mental Retardation, id. at 666 ("definite need for very early intervention, at the earliest possible time"). See also Baren, M., Liebl, R., Smith, L., Overcoming Learning Disabilties: A Team Approach 4 (1978); Wagner, R., Dyslexia and Your Child: A

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of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) and Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972)("PARC"), provided a principal impetus for the passage of the Act. 458 U.S. at 192. These suits were brought by parents of handicapped children to challenge the

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Guide for Teachers and Parents 1,153 (rev. ed. 1979); Smith, S.L., No Easy Answers: The Learning Disabled Child at Home and at School 160 (1979).

Furthermore, Petitioner's view that "there is nothing in the present record to indicate that Michael would have suffered irreparable damage," Brief at 49, suggests a view of the process of educating handicapped children, and dyslexic children in particular, totally at odds with the early intervention principles which underlie the Act.

unequal access of handicapped children to public educations. See S. Rep. No. 168, 94th Cong. 1st Sess. 6, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1430; H. Rep. No. 332, 94th Cong. 1st Sess. 3 (1975). Both Mills and PARC focussed on efforts by parents to prevent the exclusion or expulsion of their children from the public schools, as well "the widespread practice of 'dumping' -- placing handicapped children into inadequate special classes in order to rid teachers and school officials of the problem of dealing with the children's special needs." Note, "Enforcing the Right to an 'Appropriate' Education: The Education for All Handicapped Children Act of 1975," 92 Harv. L. Rev. 1103, 1121 (1979).

The consent decrees in the Mills and PARC both contain provisions similar to §1415(e)(3). See Foster v. District of Columbia Board of Ed., 523 F. Supp. 1132 (D.D.C. 1981)(the root of §1415(e)(3) lies in the Mills consent decree). Review of both cases shows that the status quo provision of the consent decree was intended to prevent the public schools from excluding children on the basis of their handicaps, rather than to place an impediment to parents' changing their child's placement.

In Mills, a class of seven children sued to compel the D.C. school system to provide them with "immediate and adequate education and educational facilities in the public schools or alternative placement at public expense." 348 F. Supp. at 868. Several of the named plaintiffs

had been excluded from the public schools as "behavior problems", others as "health problems". Id. at 869-70. Mills ruled their exclusion without opportunity for hearing or review violated constitutional guarantees.[22/] Accordingly, the Mills consent decree required a hearing prior to the "exclusion of any child from public school or to the identification of a child as in need of a special education program." 348 F. Supp. at 878. Pending the hearing, the consent decree further required

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22/ While subsequent United States Supreme Court Cases such as San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973), have undermined the constitutional basis for the Mills finding, Mills remains relevant because it identified for Congress prevalent school district practices and suggested a solution. See Rowley, supra, 458 U.S. at 197 n.21.

the school system to maintain the status quo in language nearly identical to 1415(e)(3):

> Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal ... shall warrant that the continued presence of the child in his current present program would endanger the physical well-being of himself or others.

Id. at 883. The PARC consent decree contains a similar state provision designed to respond to the exclusion of handicapped children from the Pennsylvania public schools. The consent decree provides for hearing prior to exclusions and orders that, except in certain extraordinary circumstances:

> No child of school age who is mentally retarded ... shall be subjected to a change in educational status without first being accorded notice and the opportunity of a due process hearing ... this

> provision shall also apply to any child who had never had an educational assignment.

343 F. Supp. at 303.

These consent decree provisions, nearly identical in language to §1415(e)(3), make clear that the Congressional purpose was similar to that of the Mills and PARC courts -- to ensure that handicapped children would not be excluded from the school system or "dumped" into inadequate classes while hearings and litigation regarding their status occurred. Otherwise, parents might feel financially constrained to keep their handicapped child in an inappropriate placement, or a school system might be able to use the administrative hearing as a way to delay making an appropriate placement for the child. Both results would bring about the

very exclusion that Congress passed the Act to correct.

The heart of the procedural safeguards afforded to parents is their ability to reject the IEP offered by a local educational agency and to have "an impartial due process hearing" conducted by the State educational agency which eventually results in a decision as to what the appropriate placement for their child is. 20 U.S.C §1415(b)(2), 34 C.F.R. §300.506.[23/] In the present case,

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23/ Petitioner's suggestion (Brief at 50) that the parents should be required to apply to the court for a preliminary injunction before withdrawing their child from what they consider to be an inappropriate placement runs counter to the Act's purpose. Any procedure requiring resort to the courts for injunctive relief in the first instance would subvert the detailed administrative review

(Footnote continued on following page)

the Panicos followed precisely the state and federally mandated procedures; and, as a result of those procedures, the hearing officer found that the placement offered by the Town was not appropriate, while educating the Panico's son at the Carroll School was the least restrictive appropriate placement. Congress could not have intended to provide the Panicos with the opportunity to convince the hearing officer that the placement offered by the local educational agency was not appropriate and then have intended §1415(e)(3) to stand as

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(Footnote continued from previous page)

afforded by the Act. Cf. Rowley, supra at 189. Petitioner's suggested procedure would only circumvent the Act's carefully crafted procedural safeguards and the state's opportunity to resolve placement issues through mediation and administrative hearing.

a barrier to their receiving payment from the town even after the hearing officer has decided the case in their favor. Such relief would be meaningless.[24/]

24/ If this Court concludes that Burlington's interpretation of §1415(e)(3) is generally correct, then there are numerous specific factual issues which would have to be litigated on remand before applying this interpretation to the present case. For example, is it accurate to say that the Panicos moved Michael from his "then current placement"? Michael was in a 502.2 prototype at the Memorial School. Burlington and the Panicos both agreed that this placement was not correct, and Burlington proposed to move Michael to a 502.4 placement at Pine Glen School. Thus, the factual predicate of Burlington's argument is missing. Moreover, Mr. Panico has testified that he was specifically told by Mr. Michael (superintendent of Burlington School Systems) in August, 1979 that, if he prevailed at the hearing, Burlington would abide by the decision (R.A. II, 3rd day, at 39-42). The district

(Footnote continued on following page)

III. MASSACHUSETTS LAW COMPELS THE SAME RESULT AS THE FEDERAL ACT

As Respondent Panico has argued above, the Court of Appeals was clearly correct in its construction of §§1415(e)(2) and 1415(e)(3). The former section authorizes a district court to award tuition reimbursement to the prevailing party in appropriate circumstances, and the latter section does not operate as a bar to the award of that relief.

Moreover, the Act implements its goals through a cooperative federal and state funding and regulatory scheme. As this Court has noted, the "primary responsibility" for

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court made no findings on this point because of its ruling on §1415(e)(3). However, the existence and significance of such an agreement would have to be considered on remand.

implementing the education guaranteed by the Act rests with state and local educational agencies. Rowley, supra, 458 U.S. at 207. The result required by federal law is also dictated by the statutes and regulations which implement the Act in Massachusetts. See M.G.L. c.71B and Mass. Admin. Code tit. 603, §28.100 et. seq.[25/]

In accordance with the Act's requirements for participating states, 20 U.S.C. §1413, Massachusetts law requires each school district to prepare "a special education program" when a child is identified as having special needs. Mass. Gen. Laws Ann. ch.71B, §3. Further, in accordance with the requirements of the Act, 20

25/ Pursuant to the Act, Massachusetts has filed a state plan demonstrating that its legislation and regulations are in compliance with the provisions of the Act.

U.S.C. §1413, Massachusetts law provides that "parents . . . may refuse the educational program" developed by the school district and request a hearing. Mass. Gen. Laws Ann. ch.71B, §3.

In a provision analogous to §1415(e)(3), Massachusetts requires that a handicapped child be placed in public school during the pendency of the hearings provided by Massachusetts law:

> Between the time that a child is referred for an evaluation and the time that a placement for the child is agreed upon, ordered or otherwise required ... the child shall remain in his/her educational placement....

Mass. Admin. Code tit. 603, §28.327.0.

Massachusetts regulations specifically provide for retroactive tuition reimbursement where the

parent's placement of the child is found to be appropriate.[26/] When a parent independently enrolls a child in private school and the hearing process

> determines that the IEP developed by the school committee is inadequate and the parent's choice of placement is appropriate, the school committee shall pay the full cost of instruction and support actually rendered or furnished to such child by the private school,

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26/ In certain situations, Massachusetts requires parents to be reimbursed by the school committee even though the parents' placement is not necessarily the appropriate placement: 1) where the child is placed in a special education setting by agreement between the parents and school committee, even if it later turns out that the placement is not an appropriate one; and 2) where the child is placed by the State Department of Education because the school committee and parents have been unable to agree on a placement and the child is not in a setting approved by the school committee. See Mass. Admin. Code tit. 603 §28.327.3.

> retroactive to the date the inadequate IEP was rejected by the parent....

Mass. Admin. Code tit. 603, §28.504.5(f)(emphasis added).

In Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480 (1978), the Massachusetts Supreme Judicial Court interpreted the Massachusetts counterpart of §1415(e)(3) in a similar manner to the Court of Appeals' ruling in this case. In affirming the hearing officer's order of tuition reimbursement retroactive to the date the parents had rejected the educational plan and sought a review, the court held that

> retroactive reimbursement to parents who have provided necessary services at their own expense, from the date at which they rejected the school committee's inadequate plan, is consistent with the statutory scheme.

376 Mass. at 483.

The court reasoned that reimbursement best served the statutory goal to provide public education:

> If the statutory system had worked as intended, the child would have received publicly funded educational services after his parents had accepted the originally proposed plan.

376 Mass. at 492.

Although in maintaining their child in private school the parents "assumed a financial risk" that the hearing officer "would recommend a different placement," reimbursement for an appropriate placement "places the parents and child precisely where they would have been had the school committee initially fulfilled its statutory obligations in evaluating the child." Id. at 493.

The Supreme Judicial Court specifically rejected the school committee's argument that the parents'

violation of the Massachusetts status quo provisions barred their right to receive funding. The court found these provisions bore no relationship to funding:

> the language ... simply addresses the practical question of placement during the appeals process, a period of time in which no program has yet been adopted. The provisions seek to ensure that, during this period, the child experiences the least possible disruption in his educational program. They in no way undercut the school committee's responsibilities initially to provide an adequate educational plan.

Id. at 494.

Thus, the policy governing the Massachusetts status quo provision, as construed by the Massachusetts court, is directed toward protecting the child but not toward preventing the parents from eventually obtaining reimbursement. The result under the Massachusetts statutes and

regulations, which fulfills Massachusetts' obligation as a participating state under the Act, is consistent with the Court of Appeals' rulings in this case.

CONCLUSION

In its opinion, the Court of Appeals drew a roadmap for the district court to deal with several difficult and complex issues arising under the Act, including several pertaining to reimbursement. The court properly concluded that, to have any meaning, the Act must afford the district court the power under §1415(e)(2) to award tuition reimbursement; such an award is not automatic, but depends instead upon the district court's reasoned exercise of discretion to make sure that the relief it grants is "appropriate".

Moreover, the provisions of §1415(e)(3) could not possibly have been intended, the Court of Appeals held, to bar a parent from obtaining tuition reimbursement in an otherwise appropriate case. As the court noted, handicapped children are not "non perishable commodities able to be warehoused until the termination" of judicial proceedings.[27] (Pet. 130a).

Boiled down to its essence, what Burlington offers parents like the Panicos is an interpretation of the Act which makes one wonder why

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27/ Michael Panico was in third grade when the dispute over his IEP began. If Burlington is correct that he must remain in his current placement through the termination of judicial proceedings, he would not be entitled to a change in placement until next fall at the earliest, when he will be old enough to begin tenth grade.

Congress would have bothered to pass it. Parents dissatisfied with a school's proposed placement for their handicapped child apparently must leave the child in that placement while the administrative and judicial review grinds on or run the risk of being charged with "self-help" in "violation" of §1415(e)(3). If the parents silently wait and obtain a favorable decision from the hearing officer or court, such victory is bittersweet indeed; for it confirms that the child was left in an inappropriate placement during the intervening years and offers the parents nothing more than a proper plan for future years.

The Court of Appeals saw through the irony such an interpretation of the Act would produce. Its ruling that §1415(e)(2) provides the district

court with authority to award reimbursement to the prevailing party in appropriate circumstances and that the parental rights afforded by §1415(e)(3) does not constitute a bar to the district court's discretion to award reimbursement must be affirmed if the Act is to accomplish the goals Congress intended.

Respectfully submitted,

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February 15, 1985

APPENDIX

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Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

* * *

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. §1401.

Definitions

(a) As used in this chapter --

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped

child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. (18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under Section 1414(a)(5) of this title.

20 U.S.C. §1415.

Procedural safeguards

(e)(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear

additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(e)(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Mass. Gen. Laws Ann. ch. 71B

§3. Identification of school age children with special needs; needs; diagnosis of needs; proposal of program; consent; evaluations and assessments of child and program; admission or placement; procedures; restrictions; regulations; records

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs,

provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special need admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining

whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and

public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires a medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance

with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate

education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardian or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the

parents, guardians or person with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child may be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

Mass. Admin. Code tit. 603

§28.327.0
Placement pending evaluation and administrative appeal.

Between the time that a child is referred for an evaluation and the time that a placement for the child is agreed upon, ordered, or otherwise required pursuant to these regulations and consented to by the parent, the child shall remain in his/her current educational placement, subject to the following:

§28.327.1

A child who, at the time of referral for evaluation, was in the regular education program, shall remain in that regular education program, unless the school committee or the child's parents submit a written statement to the Regional Branch Office of the Division showing that the child's remaining in such program endangers the health or safety of the child or substantially disrupts such program for other children. The Regional

Branch Office may refer the matter to the Bureau of Special Education Appeals. If the showing is made, the Regional Branch Office (or the Bureau of Special Education Appeals, if the matter has been referred to it) shall within thirty days of the written statement approve an appropriate placement for the child.

§28.327.2

A child who, at the time of referral for evaluation, was in a special education program paid for by the school committee shall remain in that special education program unless the child's parents wish the child to be in the regular education program, in which case the child shall be placed in such regular education program; unless the school committee submits a written statement to the Regional Branch Office of the Division showing that the child's remaining in such special education program or being placed in the regular education program (if requested by the parents) endangers the health or safety of the child or substantially disrupts such program for other children. The Regional Branch Office may refer the matter to the Bureau of Special Education Appeals. If the showing is made, the Regional Branch Office (or the Bureau of Special Education Appeals if the matter has been referred to it) shall, within thirty days of the written statement, approve an appropriate placement for the child.

§28.327.3

A child who, at the time of referral for evaluation, was not in an educational program approved by the school committee, shall be placed in an appropriate program as determined by agreement between the school committee and the child's parents. When such agreement cannot be reached, the Regional Branch Office of the Division (or, upon referral by the Regional Branch Office, the Bureau of Special Education Appeals) shall, within thirty days of notice, select an appropriate program for the child to be provided by the school committee. If the program so selected is a special education program, the child may be placed in it only with parental consent. This paragraph shall not apply to a child who is below the minimum age for regular public school attendance, unless the child has been found to have a substantial disability. Nothing in this paragraph shall be construed to limit the operation of ¶ 205.1, subject to ¶ 504.5(f).

§28.504.5

Funding arrangements for private placements.

Subject to the provisions of Section 18 of Chapter 766 of the Acts of 1972 for "grandfathered" children, and the provisions of ¶ 504.5(f), the following provisions shall apply in each case in which a school committee,

pursuant to ¶¶ 504.2 and 504.3, places a child in need of special education in a private school:

§28.504.5(f)

If a child's parent enrolled the child in a Division-approved private day school or residential school program and appealed the child's IEP to the Bureau of Special Education Appeals or the SAC under Chapter 4, and the Bureau of Special Education Appeals or the SAC determines that the IEP developed by the school committee is inadequate and the parent's choice of placement is appropriate, the school committee shall pay the full cost of instruction and support actually rendered or furnished to such child by the private school, retroactive to the date the inadequate IEP was rejected by the parent or could reasonably have been expected by the parent. The school committee shall enter into an agreement or contract with the private school, and shall report to the appropriate Regional Branch Office of the Division that the placement has been made.